United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1051

To be argued by
PAUL VIZCARRONDO, JR.

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-1051, 76-1052, 76-1053

UNITED STATES OF AMERICA,
Appellee,

—v.—

STANLEY SIMPSON, JOHN OLIVER BRYANT
and EARL BEST,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Stanley Simpson, John Oliver Bryant and Earl Best appeal from judgments of conviction entered on September 9, 1975, in the United States District Court for the Southern District of New York, after a six day trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.

Indictment 75 Cr. 436, filed on May 2, 1975, charged Stanley Simpson, John Oliver Bryant, and Earl Best with one count of conspiracy to commit bank robbery, in violation of Title 18, United States Code, Section 371, and one count of entering a bank with intent to commit a felony in the bank, in violation of Title 18, United States Code, Sections 2113(a) and 2. All defendants moved before trial to suppress, variously, certain tangible evidence and a post-arrest confession. Judge Cooper denied the mo-

tions in all respects without a hearing in an opinion reported at 400 F. Supp. 1396 (S.D.N.Y. 1975). Trial commenced on September 2, 1975, and concluded on September 9, 1975, when the jury found Bryant and Best guilty on both counts and Simpson guilty on the substantive count.*

On October 9, 1975, Best and Bryant each were given a maximum sentence by Judge Cooper of twenty-five years in prison and a $15,000 fine, and were committed to a ninety day psychiatric study under Title 18, United States Code, Section 4208(c). Simpson, who was twenty years old at the time of conviction, was committed to a 60 day study under Title 18, United States Code, Section 5010(e), the Youth Corrections Act. On January 13, 1976, Best and Bryant each were resentenced on count two, the substantive count, to a term of imprisonment of twelve years, and on count one to a term of imprisonment of five years, to run concurrently with the sentence imposed on count two. Both terms of imprisonment were imposed pursuant to Title 18, United States Code, Section 4208(a)(2). Judge Cooper sentenced Simpson to a term of imprisonment of twelve years, pursuant to Title 18, United States Code, Section 4208(a)(2).

Statement of Facts

The Government's Case

A. Sergeant Henry's observations

Sergeant William Henry, supervisor of an anti-crime unit** of the New York City Police Department and a veteran of 14 years experience, testified that he was

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* Simpson was acquitted on the conspiracy count.

** An anti-crime unit consists of patrolmen and detectives "who work in civilian clothes trying to blend in an area to prevent crime and apprehend perpetrators of crime" (Tr. 71).

on duty at about 1:20 P.M. on April 24, 1975 in an unmarked police department taxi cab. The cab, which had been proceeding in an easterly direction, was stopped at a traffic light on 20th Street, west of Fifth Avenue, in Manhattan. Officer William Galluba was driving the cab, and Officer John Reddy was seated in the rear of the cab with Sergeant Henry. All three men were in civilian clothing.

While the cab was still stopped at the light, Sergeant Henry noticed Earl Best and John Oliver Bryant walking west on 20th Street and across Fifth Avenue to a branch of the Chemical Bank located on the northwest corner of 20th Street and Fifth Avenue. The two men walked past the bank's side entrance on 20th Street and peered into the building, then turned around and walked back towards Fifth Avenue. Bryant entered the bank and Best continued back across Fifth Avenue to a tan Pontiac parked on the north side of 20th Street, between Fifth Avenue and Broadway, with its front end pointing east and its engine running. Best talked with a man sitting in the driver's seat of the car.

Officer Reddy got out of the car and entered the Chemical Bank, and Galluba and Henry proceeded in the cab to 20th Street and Broadway, where Galluba made a right turn and parked the cab. Henry and Galluba got out of the cab and, while standing by the side of a building on the northwest corner of 20th Street and Broadway, Henry was able to see Best, after talking with the driver of the Pontiac, walk to the south side of 20th Street and look in the direction of the Chemical Bank. Bryant came out of the bank and made a hand signal towards Best. Best returned to the Pontiac, had another conversation with the driver, and then rejoined Bryant on Fifth Avenue, where they proceeded north.

Sergeant Henry, leaving Galluba at 20th Street and Broadway, walked north on Fifth Avenue. He ducked

into a doorway upon seeing Best and Bryant walking towards him between 21st and 20th Streets, and the two men walked past him. Henry then joined Officer Reddy and Officer Anthony Ricciardi, and the three police officers followed Best and Bryant to a branch of the Manufacturers Hanover Trust Company ("MHT") located at 18th Street and Fifth Avenue. Best and Bryant entered the bank through its Fifth Avenue entrance. Henry, looking into the bank through its front window and the window of its front door, observed Best standing on a teller "feeder" line, while Bryant, his back to Henry, was talking with the uniformed bank guard. Bryant had his left hand in his left coat pocket and appeared to put his right arm around the guard's waist and his right hand near the guard's revolver. Bryant walked with the guard into an alcove in the rear of the bank.

After making these observations, Henry turned the corner of 18th Street and saw Best walking quickly out the bank's side door. Best walked along the side of the bank to where Henry and the other two officers were standing. The policemen, with their guns out of sight, stopped Best and identified themselves, and Henry frisked Best for weapons, finding nothing (Tr. 101). As that was being done, Bryant walked out of the bank's 18th Street entrance, which was about fifty feet away. Reddy and Ricciardi stopped Bryant near the side door and began to frisk him. Henry asked Best to come with him to where the other officers were frisking Bryant. As they walked, Henry noticed Best remove a white piece of paper from his right jacket pocket and discard it. Henry retrieved the paper from the sidewalk. Seconds later he saw Reddy holding what appeared to be a hand grenade (Tr. 77-91, 100, 103, 126).* The paper that

* Sergeant Henry also testified, out of the presence of the jury on the issue of the probable cause for the arrests of the defendants, that after Best and Bryant were arrested he went

[Footnote continued on following page]

Henry had retrieved was a note that read as follows (GX 17):

> "FREEZE: KEEP HANDS IN VIEW: DON'T TRY ANYTHING, OR YOU WILL DIE: I HAVE A *BOMB*::: PUT ALL MONEY ON TOPBIG [sic] BILLS FRIST [sic]·
> "NOW, WHEN YOU FINISH AND I GO WAIT FIFTHTEEN [sic] MINTUES [sic] BEFORE YOU DO ANYTHING YOU WILL BE *WATCHED*."

B. Officer Reddy's observations

John Reddy, a police officer for 12 years, testified that he saw Best and Bryant peer into the Chemical Bank through its front and side windows, and then Bryant walk into the bank. Reddy followed Bryant and observed him standing on a teller "feeder" line. While Bryant was still standing on line, the officer left the bank and saw Best walk to the tan Pontiac and converse with the driver, then rejoin Bryant, who had exited the bank, on Fifth Avenue. Reddy followed the two men north on Fifth Avenue. He noticed that Bryant was wearing an overcoat buttoned all the way to the top—even though it was a bright and sunny spring day with the temperature about sixty degrees—and kept his left hand in his left coat pocket. Bryant also appeared to be holding his left arm very stiffly.

Upon arriving at a branch of the Chase Manhattan Bank located at Fifth Avenue and 23rd Street, Best and

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to 19th Street, between Irving Place and Park Avenue South, where the tan Pontiac was then parked. He told Officer Galluba and Detective Donald Schwarz, who were keeping the car under surveillance, that Best and Bryant had been arrested with a demand note and practice hand grenade. Henry then returned to the police station (Tr. 436-37).

Bryant conversed between themselves and peered through the bank's front and side windows. After about five minutes of this, they walked south on Fifth Avenue to the MHT, which they entered. Looking into the bank, Reddy observed Best on the teller "feeder" line and Bryant walking the guard to the back of the bank. Bryant's left hand was still in his coat pocket and his right hand near the guard's revolver.

Reddy entered the bank through the Fifth Avenue door. Best looked at him and suddenly turned around and walked quickly out the 18th Street door. Reddy exited the bank through the same door he had entered and turned the corner of 18th Street, where he and the other two policemen stopped Best. They asked Best what he had been doing in the bank, but Best did not answer (Tr. 205-07).

Reddy then saw Bryant leaving the bank through its side door. Reddy and Officer Ricciardi went up to Bryant and identified themselves as police officers, and Reddy frisked him. Reddy felt a hard object on the left side of Bryant's overcoat. He removed the object from Bryant's left coat pocket, and discovered it was a practice hand grenade.* Reddy then told Best and Bryant that they were under arrest and advised each one of his constitutional rights. No identification was found on either Best's or Bryant's person. At the station house later that day, Reddy asked Bryant his name for the police arrest records. Bryant stated his name was Raymond Irving (Tr. 148-166, 340-41).

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* A practice hand grenade is used to simulate the size, weight and approximate texture of a real hand grenade. It differs from a real hand grenade in that it does not contain explosive powder and it does not have a movable lever, or "spoon," along one side. It otherwise looks and feels like a real hand grenade (Tr. 411-12).

C. Officer Galluba's observations

Officer William Galluba, a six-year veteran, testified that he saw Best and Bryant on the sidewalk outside the Chemical Bank. Best then walked to the tan Pontiac and talked with the driver, whom Galluba identified as Stanley Simpson. After a short time, Best walked back to 5th Avenue, but Galluba thereafter saw him walk part way down the block on which the Pontiac was parked and make a hand signal towards the car. Best then walked back towards Fifth Avenue and Galluba did not see him again.

After several minutes, Simpson got out of the car and walked west on 20th Street, approaching the corner of Fifth Avenue before Galluba lost sight of him. Simpson soon returned to the car and got back in it. Later, Simpson again climbed out of the car, leaned on the door, and looked in the direction of Fifth Avenue before re-entering the car.

After another interval, Simpson suddenly drove the car east on 20th Street. Galluba, now joined by Detective Donald Schwarz, attempted to follow in the cab but was stopped by a traffic light at 20th Street and Park Avenue South as Simpson made a right turn onto Irving Place. When the light changed, Galluba also made a right turn onto Irving Place, but when he next saw the car it had already been parked on 19th Street, between Irving Place and Park Avenue South. It was empty and its doors were locked.

Galluba and Schwarz got out of the cab and kept the Pontiac under surveillance from across the street. After a time, Galluba walked to the corner of 19th Street and Park Avenue South, from where he spotted Simpson walking south between 20th and 19th Streets. Simpson walked to 18th Street and made a left turn. Galluba returned

to where Schwarz was stationed opposite the Pontiac A few minutes later Simpson was again spotted, this time walking north on Irving Place towards 19th Street. At 19th Street he walked into the middle of the street, and then west on 19th Street for a few feet before suddenly turning around and continuing north on Irving Place. Galluba and Schwarz jumped into the cab and proceeded to the corner of Gramercy Park West and Gramercy Park South, where they left the cab and arrested Simpson. Detective Schwarz took from Simpson's pocket a key to the tan Pontiac (Tr. 259-306).

Among the items subsequently taken from the Pontiac was a wallet containing the papers of Earl Best, including three papers with Best's fingerprints on them (GX 7, 8; Tr. 377-78).*

D. Post-arrest statements of Simpson and Best

Special Agent Stephen Carbone of the Federal Bureau of Investigation testified that he interviewed Simpson on the evening of his arrest. After advising Simpson of his constitutional rights, Carbone asked him if he knew any individuals named Earl Best, Raymond Irving or John Oliver Bryant. He denied knowing any of those persons. Simpson admitted driving the tan Pontiac from New Jersey to New York on that day. Carbone also took from Simpson's person a note pad, one page of which was inscribed "Earl Best" and "622-0679." (Tr. 357-65, 370).**

Special Agent Joseph D. Martinolich of the FBI testified that he interviewed Earl Best on the afternoon

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* Best's fingerprint was also found on the demand note that Sergeant Henry seized when Best tried to discard it (Tr. 377-78).

** This evidence was admitted only against Simpson.

of his arrest. After being advised of his rights by Martinolich, Best stated that "he would like to talk, and he wanted to get everything off his chest." (Tr. 418). Best stated that on the morning of April 24, 1975, while in Newark, New Jersey, he decided to rob a bank in New York City, and told his plan to a stranger he thereafter met in downtown Newark. Best told this unknown person that all the latter would have to do is keep the guard busy while Best gave the teller a note. Best expected to obtain between $2000 and $4000 from this robbery, and offered to split it with the other person. The unknown person agreed, and Best gave him a practice hand grenade to use in case the guard or someone else became excited.

Best continued his story by stating that the two of them took public transportation to Manhattan, arriving at 34th Street, from where they proceeded to 20th Street and Fifth Avenue. They decided they should "case" several banks to find the most appropriate one to rob, and so they cased—but rejected—three banks in the area, with the other person actually entering one of the banks to examine its layout. Finally, they entered a bank located at Fifth Avenue and 18th Street, where the second person proceeded to the area of the uniformed guard while Best got on the teller's line. Best was going to give the teller the demand note that was in his pocket, but suddenly felt that something was wrong—that someone was watching him. At the last minute, therefore, instead of giving the teller the note as planned, Best asked her to change some dollars. Best took the change and departed the bank, and was stopped and arrested.

Best identified the demand note Sergeant Henry had seized as being the note he had typed, and the practice

hand grenade taken from Bryant as being the one he had given to the other person (Tr. 413-24).*

The Defense Case

None of the defendants testified in his own behalf.

Defendant Bryant called Louis Vita, a uniformed guard at the MHT, who testified that on April 24, 1975, between 1:30 and 1:45 P.M., he was on duty at the bank when a black male entered the bank's Fifth Avenue door and walked up to Vita. The man asked Vita if he had seen a child with an ice cream cone in his hand enter the bank; Vita said no. Vita then walked away from the man and attended to his own business. The man remained in the bank for a few moments before leaving. Vita was unable to identify anyone in the court room as the man who had approached him that day.

On cross-examination, Vita stated that after speaking with the unknown man, Vita walked into an alcove in the rear of the bank, then back towards the front of the bank and again back into the rear alcove. He further testified that when he walked to the rear of the bank he did not know where the man was; that he did not see the man leave the bank; and that he only looked at the man for a few seconds (Tr. 450-53).

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* The testimony as to Best's post-arrest statements was admitted only against Best.

The Government also introduced evidence that the deposits of the Chemical Bank, the Chase Manhattan Bank and the MHT were insured by the Federal Deposit Insurance Corporation on April 24, 1975, and that neither Simpson, Best nor Bryant had any kind of account at the Chemical Bank or the Chase Manhattan Bank on that day (Tr. 139-46).

In addition, the Government and the defendants stipulated that if called as a witness, Elizabeth Miranda would have testified that on April 24, 1975, at about 1:30 P.M., she was on duty as a teller at the MHT; that a lone black male walked up to her, gave her a five dollar bill and asked her for change; that she gave him five dollars worth of dimes; and that he then left the bank (Tr. 454).*

Defendant Simpson called Marian Wilkins, who testified that she lived in Newark, New Jersey and that she was the owner of the tan Pontiac that Simpson was driving on April 24, 1975, that she had loaned it on that day to Simpson, whom she had been seeing socially; that he did not tell her that he was taking the car to New York City; and that he had her permission to drive the car to any place within a reasonable distance of Newark. Wilkins identified as belonging to her daughter a toy gun that had been found under the front seat of the car after Simpson's arrest. She also stated that a pocketbook found in the car's trunk was hers, and that several coats found in the trunk belonged to her ex-husband (Tr. 466-72).

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* Bryant also called Josie Fondell and Marian Wilkins to identify a suit of Bryant's that Fondell picked up in late April or early May, 1975, when the two women visited Bryant at the Federal House of Detention in Manhattan. Fondell further testified that she had seen Bryant wear the suit on previous occasions, and that when she picked up the suit at the House of Detention an inside jacket pocket was torn. She did not know, however, when the pocket had been torn (Tr. 458-63). Bryant also recalled Officer Reddy to the stand. Reddy could not remember if he previously had seen the suit identified by Fondell and Wilkins, and denied that he took the practice hand grenade from Bryant's inside jacket pocket (Tr. 456-57, 464-65).

ARGUMENT

POINT I

The stop and arrest of Best were proper.

Best and Bryant attack the admission into evidence of the demand note and Best's confession on the ground that they are the fruits of an arrest that was made without probable cause. This claim is meritless in that the seizure of the demand note was properly made in the course of a valid investigatory stop, and, in any event, there was ample probable cause to arrest Best as he fled the MHT.

At the outset, it should be noted that Bryant cannot obtain relief on the basis of this claim. Assuming *arguendo* that the arrest of Best was illegal, Bryant has no standing to attack the admission of the demand note and Best's confession as fruits of that arrest. See *Brown* v. *United States*, 411 U.S. 223, 229 (1973); *Alderman* v. *United States*, 394 U.S. 165 (1969); *United States* v. *Tortorello*, Dkt. No. 75-1376 (2d Cir. April 1, 1976), slip op. at 2886-87.*

Best concedes that the police officers, on the basis of their observations of Best and Bryant over the preceding 20 to 30 minutes, were entitled to stop and frisk him upon his exit from the MHT. Best argues, however, that his detention by the officers before the demand note

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* The seizure of the practice hand grenade from Bryant's outer coat pocket was pursuant to a proper investigatory stop and a frisk for weapons. *Terry* v. *Ohio*, 392 U.S. 1 (1968). Bryant does not challenge on this appeal the propriety of the stop and frisk, the legality of his arrest or the admission of the hand grenade.

was found was an arrest, rather than a stop.* As we argue elsewhere, the officers had ample probable cause

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* In support of this notion that he was immediately placed under arrest, rather than stopped, Best argues that he was "surrounded" by three officers and held at gunpoint. As discussed in the text, it is irrelevant for purposes of this appeal whether Best was functionally "stopped" or functionally "arrested" before the demand note was discovered. It should be noted, however, that when Best was stopped inside the Bank, the officers were only in front and on two sides of him, not in back of him (Tr. 204-05), and two of the three officers almost immediately left him to stop Bryant. Further, the officers' guns were in their pockets and out of sight. Best argues that the district court erred in not admitting into evidence a memorandum, purportedly written by Sergeant Henry, requesting departmental recognition for the officers participating in the arrests of Best, Bryant and Simpson. Best contends that the memorandum was admissible under Fed. R. Evid. 803(6) or 803(24). Rule 803(6) is the hearsay exception for records kept and made in the regular course of a business activity. While it is questionable whether the memorandum here could qualify as such a record, Best did not even attempt to have Sergeant Henry or another witness so qualify it. Rule 803(24) is the miscellaneous exception to the hearsay rule. One of its requirements is that the statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Here, Henry himself, the purported author of the memorandum, was available to testify and was in fact cross-examined on the contents of the memorandum. He testified that his gun was drawn in that it was removed from his ankle holster and placed in his pocket, but his and the other officers' guns were not in sight (Tr. 441-42).

Further, the facts that an officer may have placed a hand on Best's arm, and that Best would not have been free to leave immediately after the frisk, are of little importance. In *United States ex rel. Richardson* v. *Rundle*, 461 F.2d 860, 862 (3d Cir. 1972), *cert. denied*, 410 U.S. 911 (1973), for example, a police officer making a *Terry*-type stop grabbed the defendant and walked him some distance to a police car, where he was frisked. A *Terry*-type stop is a forcible stop and detainer, and the suspect is not at liberty to leave. See *Terry* v. *Ohio*, 392 U.S. 1, 16-19 (1968). If the suspect voluntarily stops and is free to leave at any time, there probably would be no arguable Fourth Amendment issue. *Cf. Adams* v. *Williams*, 407 U.S. 143, 146 & n.1 (1972); *Terry* v. *Ohio*, 392 U.S. at 16.

to arrest Best and Bryant upon their departure from the MHT. The issue raised by Best, however—that he was in effect under arrest, rather than only stopped—is a false one. Assuming *arguendo* that Best was in fact arrested without probable cause, that alone would not entitle him to any relief in this case. The illegality of that arrest becomes relevant only if evidence that was seized pursuant to the arrest is admitted at trial. *See, e.g., Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963). Here, no evidence was so seized or admitted. Best concedes that the police officers had grounds to stop him and does not contend that their frisk of him for weapons exceeded the scope of their authority in stopping him. That was the only search of Best conducted before Sergeant Henry seized in plain view the demand note that Best discarded in Henry's presence.* Even if we were to assume, therefore, that Best was unlawfully arrested before the seizure of the demand note—a point at which Best concedes there was probable cause to arrest him (Best Br. at p. 13)—Best has no basis for complaint because the only search that occurred prior to that point was a frisk for weapons, which the officers clearly had a right to conduct.**

Best further appears to contend that he should have been released after Sergeant Henry frisked him and found no weapons, and it is in part that continued detention that turned a proper stop and frisk into an arrest. Such a contention is erroneous. "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the

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* The officers, for example, did not conduct a thorough search of Best's person for weapons and evidence, as they would have been entitled to do pursuant to an arrest. *Chimel* v. *California*, 395 U.S. 752, 762-63 (1969).

** Moreover, that frisk turned up no evidence.

facts known to the officer at the time." *Adams* v. *Williams*, 407 U.S. 143, 146 (1972); see *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968); *United States* v. *Rodriguez*, Dkt. No. 75-1287 (2d Cir. March 11, 1976), slip op. at 2590-92; *United States* v. *Salter*, 521 F.2d 1326, 1328 (2d Cir. 1975); *United States* v. *Santana*, 485 F.2d 365, 368 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States* v. *Scheiblauer*, 472 F.2d 297, 300-01 (9th Cir. 1973), Thus, the justification for the stop here was not to search Best for weapons, but to hold him briefly for investigatory interrogation.* Pursuant to this stop, the officers were justified in frisking Best, not for evidence of a crime, but to discover any weapons Best may have been carrying so as to protect themselves and others. *Adams* v. *Williams*, 407 U.S. at 146. When the frisk was concluded, rather than having to let Best go, the officers were allowed to detain him as they had not yet conducted the questioning that was the purpose of the stop. There was also nothing wrong in Sergeant Henry asking Best to accompany him to where Bryant and the other two officers were standing. See *United States* v. *Salter*, *supra*, 521 F.2d at 1328-29; *United States ex rel. Richardson* v. *Rundle*, 461 F.2d 860, 862-63 (3d Cir. 1972), *cert. denied*, 410 U.S. 911 (1973). Sergeant Henry's seizure of the demand note, dropped in plain view by Best during this stop, was therefore proper and untainted by any antecedent illegal police action. See *United States* v. *Salter*, *supra*, 521 F.2d at 1329; *United States* v. *Harflinger*, 436 F.2d 928, 932 (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

Even if Best is considered to have been placed under arrest upon his exit from the MHT, the police officers had ample probable cause to arrest him and Bryant. A warrantless arrest is constitutionally valid if, at the mo-

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* A state police officer's stopping of a suspect must be proper under both the Constitution and state law. *Ker* v. *California*, 374 U.S. 23, 37 (1963). The officers here were authorized to stop Best under N. Y. Crim Proc. Law § 140.50 (McKinney's 1971).

ment the arrest was made, "facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); see *United States ex rel. LaBelle* v. *LaVallee*, 517 F.2d 750, 753-54 (2d Cir. 1975). Here, the officers had Best and Bryant under observation for 20 to 30 minutes. During this period, Best and Bryant looked in the front and side windows of a bank as they conferred between themselves. Then, as Bryant entered the bank and got on line, Best walked one half block and spoke with Simpson, who was sitting in the driver's seat of a car parked with its engine running. Upon Bryant's exit from the bank, he and Best exchanged hand signals, whereupon Best left Simpson and rejoined Bryant. The two men walked several blocks north to a second bank, where they again looked in the front and side windows and conferred between themselves—actions that would lead a prudent man to believe they were "casing" banks in preparation for a robbery. After a few minutes they walked back south to a third bank, the MHT, and entered. All during this time Best kept his overcoat buttoned to the top, although it was a warm day, and held his left arm stiffly, with the hand in his coat pocket. The officers saw Best get on a teller "feeder" line while Bryant, his left hand still in his coat pocket, appeared to place his right arm around the waist of the bank guard, near the guard's gun, and walk the guard into the rear area of the bank. When Officer Reddy entered the bank, Best looked in his direction, did an about-face, and walked quickly out the bank's side entrance, followed by Bryant.

The fact that an officer who has reasonable cause to believe that a serious crime has been committed does not know positively that any crime has been committed or precisely what type of crime may have been committed

does not preclude that officer from having probable cause to arrest a suspect. *United States ex rel. Frasier* v. *Henderson*, 464 F.2d 260, 262-63 (2d Cir. 1972); *Bell* v. *United States*, 280 F.2d 717 (D.C. Cir. 1960). The test is not absolute certainty, but probable cause. Here, the observations of the officers leading up to and including Best's and Bryant's hasty departure from the bank were sufficient to warrant a prudent man in believing that the two men had attempted to rob or in fact had robbed the bank.

Peters v. *New York*, decided by the Supreme Court in *Sibron* v. *New York*, 392 U.S. 40, 48-50, 66-67 (1968), is instructive on this issue. There, a police officer, at home in his apartment and dressed in civilian clothes, observed through the peephole of his door two strangers tiptoeing furtively and acting suspiciously in the hall. The officer went out into the hall, the men fled, and the officer pursued them, catching one. The Court held that at the moment he grabbed the suspect, the officer, on the basis of what he had observed, had probable cause to make an arrest for attempted burglary. The facts in the instant case supporting a finding of probable cause for Best's and Bryant's arrests for attempted bank robbery or bank robbery are even stronger than the facts the Court found sufficient to provide probable cause in *Peters*.*

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* *United States* v. *Thompkins*, 403 F. Supp. 350 (S.D.N.Y. 1975), cited by Best, is completely inapposite. There, the officers observed the defendants looking over the premises of three banks (without entering the last two banks) and then return to their car. At that point, the officers arrested them, without any probable cause to believe the defendants had attempted to rob a bank or had in fact robbed a bank. The Government contended the officers had probable cause to believe the crime of conspiracy to rob a bank was being committed, a crime, the court noted, "peculiarly difficult to observe." *Id.* at 352. The court concluded that the officers lacked sufficient probable cause, on the basis of

[Footnote continued on following page]

In sum, the officers had sufficient probable cause to arrest Best for attempted bank robbery or bank robbery when he fled the MHT. *A fortiori*, they were also justified in stopping him, frisking him for weapons, and holding him briefly for investigatory interrogation. In either event, the seizure of the demand note discarded in plain view by Best and his subsequent confession were not the fruits of any illegal police conduct.*

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the facts in that case, to arrest the defendants for conspiracy to rob banks. Here, by contrast, the officers' observations were more than ample to warrant a prudent man in believing that Best and Bryant were not merely conspiring to rob a bank, but had attempted to rob or had actually robbed a bank.

* Relying upon *Brown* v. *Illinois*, 422 U.S. 590 (1975), Best argues that if his arrest was illegal, his subsequent confession is a tainted fruit of that arrest, even though it was given after Best had received appropriate *Miranda* warnings. In *Brown*, however, the Court stated that "[t]he question whether a confession is the product of a free will under *Wong Sun* [v. *United States*, 371 U.S. 471 (1963)] must be answered on the facts of each case." 422 U.S. at 603. The fact that *Miranda* warnings had been given prior to the confession (as was done at least twice here, once at the time of arrest and once immdiately prior to Best's giving of his confession (Tr. at [illegible], 413-15)) is "an important factor . . . in determining whether the confession is obtained by exploitation of an illegal arrest," 422 U.S. at 603, although not the only factor to be considered. Among the other factors, the Court found particularly important "the purpose and flagrancy of the official misconduct." *Id.* at 604. In suppressing the confession, the Court found that the illegal arrest "had a quality of purposefulness. . . . The arrest, both in design and in execution, was investigatory. . . . The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id.* at 605. See *United States* v. *Edmons*, 432 F.2d 577, 583-84 (2d Cir. 1970).

Here, by contrast, there is no indication of purposeful misconduct by the police in arresting Best. Rather, if the arrest was illegal, it was "because law enforcement officers crossed the line, often a shadowy one, that separates probable cause from its lack. . . ." *Id.* at 583. More specifically, the officers here clearly did

[Footnote continued on following page]

POINT II

The trial court properly did not instruct the jury on the law of attempt.

Best and Bryant argue that it was plain error for Judge Cooper to "refuse" to instruct the jury on the law of attempt.* The trial court's failure so to instruct the

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not arrest Best on a pretext or for investigatory purposes, as appeared to be the situation in *Brown*. Nor has Best ever contended that he was surprised, frightened or confused before telling the FBI agent that "he wanted to get everything off his chest." (Tr. 418). If the arrest here was without sufficient probable cause, suppression of Best's subsequent voluntary confession would do little to achieve the exclusionary rule's objective of deterring improper and illegal police conduct. See *United States* v. *Calandra*, 414 U.S. 338 (1974); *United States* v. *Lucchetti*, Dkt. No. 75-1221 (2d Cir., March 4, 1976), slip op. at 2368-71. *But see United States* v. *Karathanos*, Dkt. No. 75-1322 (2d Cir., Feb. 2, 1976), slip op. at 1728-29.

Furthermore, the officers discovered the practice hand grenade on Bryant's person within minutes, if not seconds, after stopping Best. Assuming *arguendo* that the initial stop of Best was an illegal arrest, the discovery of the practice hand grenade almost immediately thereafter provided sufficient legally obtained probable cause to arrest Best, and his subsequent confession would therefore not have been obtained "by exploitation of that illegality." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963); see *United States* v. *Garcilaso de la Vega*, 489 F.2d 761, 763-64 n.3 (2d Cir. 1974); *United States* v. *Falley*, 489 F.2d 33, 40-41 (2d Cir. 1973). Moreover, if Best had not discarded the demand note, it inevitably would have been discovered during the search incident to his arrest after the practice hand grenade was found on Bryant. In any event, even if admission of the demand note against Best was error, the overwhelming evidence of Best's guilt in this case, including his detailed confession, would have made such error harmless beyond a reasonable doubt.

* Such a charge was never requested, and the court's charge was not objected to on that ground. See *United States* v. *Wright*, 459 F.2d 65, 67 (8th Cir. 1972); *United States* v. *Leach*, 427 F.2d 1107, 1112-13 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970); *Clark* v. *United States*, 405 F.2d 166 (5th Cir. 1968); *United States* v. *Caci*, 401 F.2d 664, 669-70 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

jury was not error because the law of attempt was not an issue in the case.

Best and Bryant were not charged with attempted bank robbery under the first paragraph of Title 18, United States Code, Section 2113(a), or with attempting to enter a bank with intent to commit a felony in the bank, under the second paragraph of Section 2113(a). See, *e.g.*, *Rumfelt* v. *United States*, 445 F.2d 134 (7th Cir.), *cert. denied*, 404 U.S. 853 (1971). Rather, they were charged with and convicted of actually entering a bank with intent to commit a felony in the bank, and of conspiracy. Attempt was not an issue, either as to their entry into the bank (Best and Bryant do not appear to dispute that they succeeded in entering the MHT) or their actions once they were in the bank.

United States v. *Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952), relied on by Best and Bryant, is inapposite. There, the defendant had been convicted of *attempting* to deliver defense information to a citizen of a foreign nation, and the court discussed what constituted an attempt. Accepting the wisdom of that discussion, it has no relevancy to this case because Best and Bryant were not charged with attempted bank robbery. They were indicted on the substantive count under a different provision, which prohibits entry of a bank with intent to commit a felony, and it is on that offense that the jury was instructed. The key issue under that statute, and thus under the substantive count of the indictment, is whether their entry was with the intent to steal. See *Prince* v. *United States*, 352 U.S. 322, 328 (1957); *United States* v. *Schaar*, 437 F.2d 886 (7th Cir. 1971). The trial court properly instructed the jury on that issue, as well as the other elements of the substantive count (Tr. 628-30). Moreover, the evidence of the intent of the would-be bank robbers—including the de-

mand note, the practice hand grenade, and, as against Best, his confession—was more than sufficient. The law of attempt properly was not charged because it was not an issue under either count of the indictment.

POINT III

The evidence at trial was sufficient to support Simpson's conviction on the substantive count.

Simpson contends that the evidence at trial was insufficient to establish beyond a reasonable doubt that he knew that Best and Bryant entered any bank with intent to rob it, or aided and abetted in that endeavor, and that his conviction must therefore be reversed. This argument is meritless.

The evidence at trial showed that when the police officers first observed Simpson, he was sitting in the driver's seat of a car parked in an easterly direction, with its engine running, on 20th Street between Fifth Avenue and Broadway, about one-half block from the Chemical Bank branch at 20th Street and Fifth Avenue that Best and Bryant were in the process of "casing". Upon Bryant's entry into the bank, Best walked to where Simpson was parked and conferred with him. The officers thereafter saw Best walk several feet away from the car, receive a hand signal from Bryant (now emerged from the Chemical Bank), return to the car and talk again with Simpson, walk back towards Fifth Avenue, and make a hand gesture towards Simpson.* Thereafter, Best joined Bryant, and the two continued their bank robbery preparations.

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* The officers were making their observations from different vantage points and at different times. See, *e.g.*, Tr. 310.

Simpson, meanwhile, after waiting several minutes, left the car and walked towards the corner of 20th Street and Fifth Avenue. He soon returned to the car and got back into the driver's seat. After several more minutes, he again exited the car and looked in the direction of Fifth Avenue while leaning on the car door. He then got back in the car, and after another period of waiting suddenly drove the car east, across Broadway to Irving Place, where he made a right turn.

By the time the officers were able to catch up to Simpson's car, it had been parked on 19th Street, between Irving Place and Park Avenue South. It was empty and its doors were locked. Simpson was thereafter sighted walking south on Park Avenue South, eventually making a left turn on 18th Street. The officers saw him again at Irving Place and 19th Street, where he took a few steps west into 19th Street, towards where his car was parked. Simpson suddenly turned around, however, and continued north on Irving Place for about one block, where the officers arrested him.

Later that evening, when questioned by an FBI agent, Simpson admitted having driven the Pontiac from New York to New Jersey that day, but denied knowing Best or Bryant. On his person, however, was found a note pad containing Best's name and what appears to be a telephone number. Further, in the front seat of Simpson's car, the agents found Best's wallet (Best had no identification on his person when arrested).

A person who is the driver of the getaway car in a bank robbery or an intended bank robbery, and has knowledge of the planned robbery, is guilty as an aider and abettor. See, *e.g.*, *United States* v. *Jarboe*, 513 F.2d 33 (8th Cir. 1975); *United States* v. *Cady*, 495 F.2d 742, 744-45 (8th Cir. 1974); *United States* v. *Hopkins*,

486 F.2d 360 (9th Cir. 1973); *United States* v. *Bamberger*, 460 F.2d 1277 (3d Cir. 1972), *cert. denied*, 413 U.S. 919 (1973). Moreover, a defendant's knowledge and participation may be proven by circumstantial evidence. See, *e.g.*, *United States* v. *Jarboe*, *supra*; *United States* v. *Samaniego*, 437 F.2d 1244, 1245-46 (9th Cir. 1971); *Caton* v. *United States*, 407 F.2d 367, 371-72 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969).

Here, the evidence of Simpson's waiting in the car with its engine running in the vicinity of the banks that Best and Bryant were "casing"; his conversations with Best while Bryant was "casing" the first bank a half-block away; his exits from the car during which he displayed concern for the whereabouts of his partners; his subsequent leaving of the car a few blocks from where he was first parked;* and his apparent abandonment of the car (now under surveillance) upon his return to 19th Street, were all circumstances from which the jury could find that Simpson was the driver of the getaway car for the planned bank robbery. When these facts are combined with Simpson's false exculpatory statements denying that he knew Best and Bryant, see *United States* v. *Singleton*, Dkt. No. 75-1114 (2d Cir. Feb. 13, 1976),

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* Simpson argues that his driving *away* from the MHT is evidence that he had no idea where Best and Bryant were and, therefore, did not know of the robbery plan. It is clear, however, from the fact that Best and Bryant "cased" two banks before entering the MHT that they did not know in advance which specific bank they were going to rob. Moreover, the jury could well have inferred that Simpson drove away from Fifth Avenue because he was apprehensive that the robbery plan had been foiled, and wanted to retreat to a safer place from where he could double back on foot and try to determine the fate of his partners. Indeed, if Simpson had no idea what Best and Bryant were up to, and just wanted to find them, he probably would have driven to Fifth Avenue, not away from it. In any event, Simpson made this argument to the jury (Tr. at 558-59), and the jury rejected it by its verdict.

slip. op. at 1881-82; *Mikus* v. *United States*, 433 F.2d 719, 728 (2d Cir. 1970); *Asher* v. *United States*, 394 F.2d 424, 429 (9th Cir. 1968); *United States* v. *Smolin*, 182 F.2d 782, 785-86 (2d Cir. 1950), there was more than ample evidence upon which the jury could and did find that Simpson knew of the bank robbery plan and was an active participant in it.*

In *United States* v. *Brown*, 436 F.2d 702, 704 (9th Cir. 1970), where the defendant had been convicted of bank robbery as an aider and abettor on facts less compelling than in the instant case, the court, in rejecting the defendant's attack on the sufficiency of the evidence, stated:

> "[T]he government had proved beyond a reasonable doubt that the three individuals who committed the Credit Union robbery, had been in the Volkswagen with the defendant just prior to that robbery and also that defendant was occupying the driver's seat of the Volkswagen as it was parked in the alley behind the Credit Union during the perpetration of the robbery.
>
> ". . . The only point made by appellant in his motion to acquit at close of the government's case was that the evidence was insufficient to show that defendant had knowledge of any intent to commit a robbery.
>
> "It was not necessary that the government exclude the possibility of reasonable doubt concern-

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* In addition, Simpson did not take the stand in his own defense or otherwise offer any evidence that provided a plausible exculpatory explanation for his actions on the day of his arrest. "When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version." *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974).

ing appellant's knowledge of the intended robbery —only that it present facts upon which a reasonable man, drawing reasonable inferences, *could* so find beyond a reasonable doubt."

Similarly, Simpson's actions before his arrest and his false exculpatory statement after his arrest were evidence "upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); see *United States* v. *DeGarces*, 518 F.2d 1156, 1159-60 (2d Cir. 1975).*

POINT IV

The sentencing procedure employed in this case did not violate Rule 32(c)(3) of the Federal Rules of Criminal Procedure.

Simpson, Bryant and Best each contend that their sentences should be vacated and their cases remanded for resentence because the sentencing judge did not permit their attorneys, pursuant to Fed. R. Crim. P. 32(c)(3)(A), to read the presentence reports.

Rule 32(c)(3)(A) directs the sentencing judge to permit defense counsel to examine a presentence report "upon request". Here, neither Best's nor Bryant's attorney asked to see the presentence report. As for Simpson, the following colloquy occurred between his attorney and the court at the time of sentence:

> "Mr. Concannon: Thank you, your Honor. I did not see the presentence report—I understand

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* In addition, the trial court properly instructed the jury on reasonable doubt (Tr. at 600-02), circumstantial evidence (Tr. at 634-37), and aiding and abetting (Tr. at 630-32).

your Honor's policy with respect to that—nor did I see the results of study and, for the record, I would like to make a request to see that at this time.

"The Court: Counsel, may I assure you that I shall announce what are the factors on which I predicate my sentence. In other words, the report does not have any impact whatever upon me other than the factors that I shall choose to make mention of.

"Does that satisfy you?

"Mr. Concannon: I understand." (Tr. 722-23).

To the extent there was a request to see the report, arguably the sentencing judge properly understood Simpson's attorney to be satisfied with the procedure proposed by the court and to have withdrawn his request to see the report. Thus, to the extent Rule 32(c)(3)(A) gives a defendant a right to see the presentence report prior to sentence, Best, Bryant, and Simpson each waived such right. *Cf. Virgin Islands* v. *Richardson*, 498 F.2d 892, 983-94 (1974); *United States* v. *Cox*, 485 F.2d 699 (5th Cir. 1973); *United States* v. *Rosner*, 485 F.2d 1213, 1231 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *Gallo* v. *United States*, 461 F.2d 1008 (8th Cir. 1972).

Rule 32(c)(3) does not, however, give a defendant an absolute right to see the presentence report. Subsection (C)(3)(A) states that the court should not permit defense counsel to examine the report "to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. . . ." Further, subsection (C)(3)(B) states:

> "If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera."

In this case in particular, where each defendant had been committed for observation and study prior to imposition of final sentence, it is reasonable to assume that Judge Cooper determined that substantial portions of the presentence reports and studies contained "diagnostic opinion which might seriously disrupt a program of rehabilitation," as well as other material that should not be disclosed.*

The sentencing procedure employed here was within the requirements of Rule 32(c)(3). Although he decided that the presentence reports should not be disclosed, Judge Cooper made an oral summary of the factual information contained in the reports that he relied on in imposing the sentences, including each defendant's history of unemployment, extensive prior criminal record for a person of his age, low I.Q., and satisfactory physical condition.** The sentencing procedure satisfied Rule

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* There is no requirement that the sentencing judge state the reasons for his decision not to disclose the presentence report.

** Best, who was 27 years old when arrested in this case, has been arrested numerous times since 1966, and his rap sheet appears to include convictions for petty larceny, assault and robbery, larceny from a person, jostling, shoplifting and assault and battery, attempted larceny, robbery and attempted robbery, robbery,

[Footnote continued on following page]

32(c)(3) and did not prejudice the defendants' rights at sentence. *Cf. United States* v. *Washington*, 504 F.2d 346, 349 (8th Cir. 1974); *United States* v. *Gorden*, 495 F.2d 308, 310 (7th Cir.), *cert. denied*, 419 U.S. 833 (1974); *Johnson* v. *United States*, 485 F.2d 240, 242 (10th Cir. 1973); *Untied States* v. *Virga*, 426 F.2d 13[illegible] 1323 (2d Cir. 1970), *cert. denied*, 402 U.S. 930 (1971). The sentences should not be disturbed.

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and escape and possession of a stolen motor vehicle. He was sentenced on the last robbery conviction in 1971, and received a sentence of five to seven years. Bryant's rap sheet appears to show convictions for shoplifting, larceny and possession of stolen property, larceny, possession of heroin and possession of a concealed dangerous weapon. Bryant was 24 years old when arrested in this case. Simpson, who was 20 years old when arrested in this case, has a rap sheet that appears to show convictions for loitering with intent to steal, and robbery and armed robbery. In addition, Best was a resident of the Newark Half-Way House on April 24, 1975, the date of the instant offense, and Bryant was a resident of the same institution until approximately two weeks before that date.

It should also be noted that the defendants displayed hostility towards the criminal justice system during the proceedings below. Their first set of court-appointed lawyers were permitted to withdraw from the case because of the defendants' non-cooperation (Tr. 8-9). In addition, the trial was delayed on two occasions apparently because of disruptions at the Metropolitan Correctional Center caused by one or more of the defendants (Tr. 36-38, 121-22).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Paul Vizcarrondo, Jr., being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 16th day of April, 1976, he served a copy of the within brief by placing the same in ~~a~~ properly postpaid franked envelopes addressed:

Daniel H. Murphy, II, Esq.
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Victor J. Herwitz, Esq.
22 E. 40th St.
New York, N.Y. 10016

Phyllis S. Kloot Bamberger, Esq.
Federal Defender Services Unit
509 United States Courthouse
Foley Square, New York, N.Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Paul Vizcarrondo, Jr.

Sworn to before me this
16th day of April, 1976

LAWRENCE FARKAS
Notary Public, State of New York
No. 24-4606580
Qualified in Kings County
Commission Expires March 30, 1977